UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

PETER D. MOSS	:	
	:	
v.	:	
	:	Civil No. 1:03CV203
E.ON AG (successor in interest to VEBA AG), et al.	:	
	:	

RULING ON MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF
(Paper 4)

In this action, pro se plaintiff Peter Moss seeks damages for alleged "bodily injury" he suffered when one of the defendants terminated the employment of his spouse in February 1992. The complaint contains a myriad of defects, including lack of personal jurisdiction over the named defendants, improper venue, and the expiration of applicable statutes of limitation. More important, however, the subject matter of this complaint has been exhaustively, definitively, and finally litigated in another federal court. See generally Affidavit of Heather Boshak (Paper 7) and exhibits thereto.

Specifically, Mr. Moss joined his wife as a co-plaintiff in a complaint filed in the United States District Court for the Southern District of New York in 1992. See Paper 7 at Ex. B (hereinafter the "Southern District action"). In the Southern District action, the plaintiff and his wife alleged that Stinnes Corporation dismissed Mrs. Moss from her secretarial position in violation of the Age Discrimination in

Employment Act, 29 U.S.C. § 621, et seq. The plaintiff further sought recovery for financial, emotional and physical damage he personally suffered as a result of his wife's termination. See Paper 7 at Ex. H, p. 1 and at Ex. Q.

The District Court (Keenan, D.J.) considered and rejected Mr. Moss' claims, finding as a matter of law that "[t]o state a claim under ADEA, a plaintiff must allege an employer-employee relationship" and that "Peter Moss does not allege that he was ever employed by Stinnes." Moss v. Stinnes Corp., 92 Civ 3788 (JFK), Memorandum Opinion and Order (S.D.N.Y. Jan. 28, 1993). After his dismissal as a party, the plaintiff attempted to reenter the Southern District action as an intervener for the loss of consortium and personal injuries he allegedly suffered as a result of his wife's ADEA suit. Denying his request to intervene, Judge Keenan held:

> Under Fed. R. Civ. P. 24, a movant seeking intervention as of right must "set[] forth the claim . . . for which intervention is sought" and must demonstrate an interest in the event or events which are at issue in the pending litigation. Mr. Moss' motion to intervene is denied because his proposed claims in intervention fail to state a valid claim for relief.
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> First, as this Court held in its January 28, 1993 Memorandum Opinion and Order, Mr. Moss does not have any legally cognizable claim for relief under the ADEA or HRL based on the employment discrimination claims asserted by his wife. The ADEA applies only to employees and does not provide for claims of loss of spousal consortium. (citations omitted).

> Second, Mr. Moss may not assert claims of intentional infliction of emotional distress. By order dated December 14, 1992, this Court adopted Magistrate Judge Bernikow's November 10, 1992 Report and Recommendation denying then-plaintiffs Peter and Barbara Moss' motion to add claims for intentional infliction of emotional distress.

Moss v. Stinnes Corporation, 92 Civ. 33788 (JFK), Memorandum Opinion and Order (S.D.N.Y. Aug. 25, 1997)(appended to Paper 7 as Ex. R). On appeal, the Second Circuit affirmed the dismissal of plaintiff's claims. See Moss v. Stinnes Corp., 169 F.3d 784 (2d Cir.)(per curiam), cert. denied, 528 U.S. 879 (1999).

Based on this record, the Court finds the complaint Mr. Moss has filed in this Court is barred by res judicata. The doctrine of res judicata "states that once a final judgment has been entered on the merits of a case, that judgment will bar any subsequent litigation by the same parties or those in privity with them concerning the transaction, or series of connected transactions, out of which the [first] action arose." Maharaj v. Bankamerica Corp., 128 F.3d 94, 97 (2d Cir. 1997)(citation and quotations omitted). Here, the District Court for the Southern District of New York and the Second Circuit have adjudged the plaintiff's claims and the related claims of his wife. It is also noteworthy that, prior to this action, Mr. Moss filed a similar complaint in the Northern District of New York. That complaint was transferred

to the Southern District of New York and then dismissed on res judicata grounds. See Paper 7 at Exs. AA through EE. In short, the issues this plaintiff now attempts to raise have been previously litigated and are therefore barred by res judicata.

Furthermore, after the Southern District action was remanded from the Second Circuit, Mr. and Mrs. Moss settled Mrs. Moss' remaining claims against one or more of the defendants in this suit. See generally Paper 7 at Exs. V through Z. That settlement presents another ground for dismissal of the duplicative claims raised in this complaint. See, e.g., Alentino, Ltd. v. Chenson Enter., Inc., 938 F.2d 26, 28 (2d Cir. 1991).

Finally, the movants ask the Court to issue an injunction barring the plaintiff "from filing any further action on these claims in any court or tribunal." Paper 4 at 25. To determine whether to restrict a litigant's future access to courts, the Court must consider the following:

> (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

> Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties.

Safir v. U.S. Lines Inc., 792 F.2d 19, 24 (2d Cir. 1986).

Upon review of these factors, the Court finds the issuance of an injunction is not appropriate at this time. The Court is troubled by the plaintiff's apparent forum shopping; he has attempted to file the same claims in the Southern District of New York, the Northern District of New York, and now in the District of Vermont. He is, however, a pro se plaintiff, so the Court will not assume the level of understanding of the judicial system as an attorney would possess. Moreover, his conduct does not yet reflect the same sort of conduct which has supported the issuance of an injunction in other cases. See, e.g., In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984).

The plaintiff is explicitly cautioned, however, that the facts and law clearly indicate he is not entitled to resubmit the claims which underlie the complaint he has filed in this case, and that any further attempts to litigate those claims, either in federal or state court, may result in the imposition of monetary sanctions and the issuance of an injunction which would bar him from filing further lawsuits without prior permission of the court.

The complaint is DISMISSED in its entirety.

SO ORDERED.

Dated at Brattleboro, Vermont, this ____ day of October, 2003.

_____
J. Garvan Murtha
United States District Judge